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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1216.

42ND ST. FOTO SHOP, INC., FOTOSHOP, INCORPORATED and SAM MARCUS, d/b/a MARCUS PHOTO SERVICE and as FOTOSHOP,

Petitioners,

vs.

NEW YORK STATE LABOR RELATIONS BOARD.

REPLY BRIEF IN SUPPORT OF PETITION.

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Respondent's Point I Is Based Upon Mis-construction of Both the Judicial Code and the Appellate Procedure of the Courts of New York, and Upon Mis-interpretation of the Authorities Cited By It.

The writ of certiorari prayed for by the petition herein is one sought to be directed to the Supreme Court of the State of New York. Respondent's argument, in support of its Point I (respondent's brief, pages 5, *et seq.*) seeks to create the impression that the writ sought is to be directed to the Court of Appeals of the State of New York. This is indicative of the confusion into which respondent has fallen.

The sole issue in respect of this is whether there has been compliance below with the condition precedent set up by the Judicial Code (§237, amended). The Code provision requires merely that there has been rendered or passed a final judgment or decree " * * * by the highest court of a State in which a decision could be had * * *." If such be the case here, then respondent's Point I is wholly without merit.

The final order below was the order of the Supreme Court of New York, County of New York, dated December 8th, 1944, and made on the Remittitur of the Court of Appeals (R. 1403-4). That order is the final order in this proceeding in the State of New York, and is entirely silent on the matter of costs (compare respondent's brief, p. 7). The entire record of the State proceedings is now lodged with the Supreme Court, New York County, and nowhere else.

That the confusion into which respondent has fallen may be clearly comprehended, brief reference is here made to the pertinent statutory and practice provisions of the State of New York.

The State Labor Relations Act (Labor Law of the State of New York, Article 20, §707, subd. 3), entitled Judicial Review, provides as follows:

> "The jurisdiction of the supreme court shall be exclusive and its judgment and decree shall be final, except that appeals shall lie to the appellate division of said court and to the court of appeals, in the manner and subject to the limitations provided in the civil practice act irrespective of the nature of the decree or judgment or the amount involved."

Pursuant thereto, petitioners had appealed first to the Supreme Court, then to the Appellate Division, and finally to the Court of Appeals, which appeals were "in the manner and subject to the limitations provided in the civil practice act * * * ".

The appeal to the Supreme Court, County of New York, was by order to show cause and supporting petition (R. 5-16).

The appeal to the Appellate Division of the Supreme Court, First Judicial Department, was by notice of appeal (R. 2-3).

Following the unanimous affirmance by the Appellate Division (R. 1369-70), petitioners no longer had available to them any appeal as a matter of right (Civil Practice Act of New York, Article 38, §589), as provided in the Civil Practice Act (§588). The Appellate Division having affirmed without opinion, the grounds of its affirmance were unknown. That affirmance may have been based upon the provisions of the State Labor Relations Act, which provide that:

> "The findings of the board as to the facts, if supported by evidence, shall be conclusive" (§707).

Or, that affirmance may have been upon the ground that the constitutional issue raised by petitioners was without merit. Either suffices. In any event, the Court of Appeals had complete jurisdiction.

That being so, and despite the provision of the Civil Practice Act, that an appeal lies to the Court of Appeals as of right if "there be directly involved the construction of the constitution of the state or of the United States;" (Civil Practice Act, §588 1[a]), petitioners could not avail themselves of this provision because the issue below was determinable on a basis not limited exclusively to construction of the constitutional provisions urged.

> *People of the State of New York ex rel. Ryan* v. *Lynch, et al.,* 262 N. Y. 1, at page 4.

Consequently, petitioners could only seek permission to appeal. This they did, first to the Appellate Division (R. 1372-7), and upon being denied there, then to the

Court of Appeals itself (R. 1382-5). No further, nor other step, was possible.

Respondent argues nevertheless, on undisclosed authority, that the Appellate Division was the highest court of the State of New York "which has adjudicated the merits of the controversy" and therefore the writ of certiorari should have been directed to that Court (respondent's brief, p. 7). Nowhere in the Judicial Code (§237) will there be found any reference whatsoever to the phrase "adjudicated the merits of the controversy". The authorship of those words is exclusively respondent's.

This Court has considered this very issue. In addition to *Department of Banking of Nebraska, Receiver*, v. *Pink*, 317 U. S. 264 (cited in petitioners' brief, page 6), the same proposition was similarly decided in the following cases:

> *Gorman* v. *Washington University*, 316 U. S. 98;
> *Chesapeake & Ohio Railway Co.* v. *Mihas*, 280 U. S. 102;
> *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Rock*, 279 U. S. 410.

In the case last cited, this Court cited with approval from prior decisions:

> "Whenever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, *over which it by law can exercise appellate authority*, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach" (page 412). (Italics supplied.)

The test, as stated in *Gorman* v. *Washington University, supra*, is whether " * * * the possibilities afforded by state procedure for its review by all state tribunals have been exhausted" (pages 100-1).

In *Chesapeake & Ohio Railway Co.* v. *Mihas, supra,* this Court re-affirmed its holding " * * * that the denial of application for certiorari by the state supreme court was in effect an affirmance of the judgment * * * " (page 104).

The proceeding at bar falls squarely within the purview of these authorities. Whether the application to the highest court of the State be by appeal as of right, by petition for certiorari, or by petition for permission to appeal, it suffices that a petitioner for certiorari to this Court has exhausted every course open to him under the State procedure. There is literally no question that that is precisely what happened here.

The authorities cited by respondent (respondent's brief, p. 7, footnote 1) merely exemplify the confused state of respondent's argument. Indeed, these authorities support petitioners. In *Western Union Telegraph Co.* v. *Crovo,* 220 U. S. 364, the Supreme Court of Appeals of Virginia denied a writ of error from the Law and Equity Court of the City of Richmond. This Court, specifically finding that " * * * the law and equity court was the highest court of the state to which the case could be carried * * * " (page 366), held that the writ would therefore lie to that court.

Second National Bank v. *First National Bank,* 242 U. S. 600, and *Cuyahoga River Power Co.* v. *Northern Realty Company, et al.,* 244 U. S. 300, involved similar situations arising under procedure in the State of Ohio. In the former case this Court held that as the Court of Appeals of Ohio, which had affirmed the judgment of the Superior Court of Cincinnati, was the highest court in Ohio in which a final judgment could have been rendered, the writ of error should have run to the Court of Appeals and not to the Superior Court. In the *Cuyahoga* case, the objection that the writ of error should have been prosecuted to the Supreme Court of Ohio instead of to the Court of Appeals, was treated as without merit, on the ground that the Supreme Court of Ohio had dismissed the writ of error

to it for want of jurisdiction. Obviously then, in both of those instances the Court of Appeals was the highest court of the state "in which a decision could be had".

Similarly, this Court, in *Missouri, Kansas & Texas Railway Co.* v. *Elliot*, 184 U. S. 530 (miscited as page 529), having found that the Kansas City Court of Appeals "* * * was the final court in Missouri where such question could be decided, * * *" (page 539), held that the objection that the writ of error should have run to the Supreme Court of Missouri was without foundation.

The remaining authorities cited by respondent involve the same proposition. In every instance the objection urged was either sustained or denied, based entirely upon application of the criterion whether the highest court of the State in which a determination could have been had, had passed upon the matter. That test is fully met here.

The Court of Appeals could have modified or set aside, in whole or in part, respondent's order. By denying leave to appeal, though fully armed with jurisdiction, it affirmed the order (State Labor Relations Act, §707, subd. 4). Note *Chesapeake & Ohio Railway Co.* v. *Mihas, ubi supra*, page 5.

Respondent seeks further to becloud the issue here by reference to an unappealed from order made on August 18th, 1943 (respondent's brief, page 4). That order is no part of this record, except that respondent did urge that same point before both the Appellate Division (R. 1378, pa. 2, 1380, pa. 10) and the Court of Appeals (R. 1386-7). The order referred to, of course, is not involved here.

The appellate courts of New York very properly paid no attention to this contention, as indeed they could not, in view of the statutory provisions (State Labor Relations Act, §707, subd. 3).

Conclusion.

The highest Court of the State of New York which had jurisdiction to render a final judgment or decree in

this matter is the Court of Appeals. That Court, by denying leave to appeal to it, rendered a final judgment in this matter which, by its Remittitur, was made the order of the Supreme Court of the State of New York. The writ of certiorari here prayed for is sought to be directed to the Supreme Court of the State of New York.

Respondent compounds its confusion by characterizing petitioners' assignment of errors as "deficient" (respondent's brief, page 8). This alleged deficiency apparently is part of its argument urged in Point I, to-wit, that the petition for the writ of certiorari has been mis-directed, but the authorities cited by it (respondent's brief, page 8, footnote 2) are concerned solely with deficiencies in form and substance of specification of errors. These authorities are not germane to this Point I at all.

Finally, it is well to note that in its argument in chief (Point II, respondent's brief, page 8), respondent disregards completely the distinction that it sought to make in its argument under its Point I, for it refers to "the courts below", without any distinction whatsoever.

The procedural objection urged by respondent is wholly without merit and the writ petitioned for is properly directed to the Supreme Court of the State of New York.

> "The Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or hereafter may be prescribed by law not inconsistent with this article" (Constitution of the State of New York, Article VI, Section 1).

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May, 1945.

CIVIL PRACTICE ACT.

Article 38.

Appeals to the Court of Appeals.

§588. Appeal as of right.

Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that

(a) there be directly involved the construction of the constitution of the state or of the United States;

§589. Appeal by permission.

Appeal to the court of appeals by permission lies only * * *

2. by permission of the appellate division, or in case of refusal of such permission, by permission of the court of appeals, from a judgment or order of the appellate division, or of the court of original instance, which is not appealable as of right only because it does not comply with provision (a), or (b), or (c) of subdivision one of section five hundred and eighty-eight of this act.